Supreme Court
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No. 96-845

In The

Supreme Court of the United States

October Term, 1996

TIMOTHY J. ANDERSON, NEIL SINGER and ARTHUR SINGER, On Behalf of Themselves and All Others Similarly Situated,

Petitioners,

v.

GARY W. CLOW, DOUGLAS L. WHITING, ROBERT W. JOHNSON, ARTHUR J. COLLMEYER, JOHN R. WITZEL, and STAC ELECTRONICS, INC.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether this Court should accept for review a case decided under law largely superceded by the Private Securities Litigation Reform Act of 1995 and which presents no important question of law on which the United States Courts of Appeal have issued conflicting opinions?

2. Whether the "bespeaks caution" doctrine applies to claims asserted under the Securities Act of 1933 and the Securities Exchange Act of 1934 and, if so, whether the Ninth Circuit properly applied the doctrine?

3. Whether the Ninth Circuit properly affirmed dismissal of a complaint under the Securities Act of 1933 and the Securities Exchange Act of 1934 where the allegedly omitted facts were actually disclosed in the very documents alleged to have been misleading?

4. Whether Federal Rules of Civil Procedure Rule 9(b) applies to claims under Section 11 of the Securities Act where the gravamen of such claims is fraud?

OTHER PARTIES

In addition to respondents, Alex. Brown & Sons, Inc. and Montgomery Securities also appeared as defendants-appellees before the Ninth Circuit below. The following individuals and entities were parties to the proceedings in the Ninth Circuit but were dismissed by plaintiffs during the pendency of the appeal: Lawrence G. Finch, Robert A. Hoff, Russell j. Robelen, Sigma Partners, Sigma Management, Sigma Management II, L.P., Crosspoint Venture Partners and Idanta Partners.

DISCLOSURE PURSUANT TO RULE 29.6

Stac Electronics, Inc. has no parent corporation. Stac Electronics, Inc. has one non-wholly owned subsidiary, hi/fn Inc.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Gary W. Clow, Douglas L. Whiting, Robert W. Johnson, Arthur J. Collmeyer, John R. Witzel and STAC Electronics, Inc. ("Stac") respectfully oppose the petition of Timothy J. Anderson, Neil Singer and Arthur Singer for a writ of certiorari.

OPINIONS BELOW

Petitioners correctly set out the opinions below.

INTRODUCTION AND SUMMARY OF ARGUMENT

There is no issue presented by this case worthy of this Court's attention. The decisions below were all rendered under the federal securities laws as they existed prior to the enactment of the Private Securities Litigation Reform Act, which significantly changed the law governing the requirements for pleading a securities fraud class action. Any decision in this case, therefore, will have little impact on pending or subsequent cases or the law in general. Moreover, on the one issue Petitioners emphasize – the applicability of Fed. R. Civ. P. 9(b) to claims asserted pursuant to Section 11 of the Securities Act of 1933 – the Circuit Courts are unanimous. There is no conflict among the Circuit Courts for this Court to resolve. The issue, in any event, is not outcome determinative in this case. Likewise, the Ninth Circuit's holding that the pleadings demonstrated that the allegedly omitted facts were actually disclosed by defendants

involves no novel proposition of law. Finally, the Ninth Circuit's holding that the "bespeaks caution" doctrine applied to Stac's prospectus and rendered unactionable its forward-looking statements, including its statements regarding reserves for product returns, is consistent with the rulings of other Circuit Courts and with the express admonition of Congress in enacting the Private Securities Litigation Reform Act encouraging further development of the "bespeaks caution" doctrine.

STATEMENT OF THE CASE

A. Nature of the Case and Proceedings Below.

This is a securities fraud class action brought pursuant to Sections 11 and 15 of the Securities Act of 1933 (the "Securities Act"), 15 U.S.C. § 77k, § 77o; Sections 10(b) and 20(a) of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. § 78j(b), § 78t(a); and Rule 10b-5, 17 C.F.R. 240.10b-5, promulgated under the Exchange Act. The alleged class consists of purchasers of Stac common stock between May 7, 1992 and July 20, 1992 (the "Class Period").

The original complaints were filed on July 23 and 24, 1992 and were twice amended. The second version of plaintiffs' complaint, the Consolidated Amended Class Action Complaint (the "First Amended Complaint") was filed on December 4, 1992. The district court dismissed this complaint with leave to amend on September 17, 1993, in an opinion reported at [1993 Tr. Binder] Fed. Sec. L. Rep. (CCH) ¶ 97,807, at 97,982 (S.D. Cal. Sept. 17,

1993).[1] The court also stayed discovery at that time, almost fourteen months after the original complaints had been filed.

Plaintiffs filed the third version of their claims, the Second Amended Consolidated Class Action Complaint (the "Second Amended Complaint"), on November 18, 1993. Pet. App. at 167a-252a. They named nine new defendants in this complaint. *Id.* at 186a-187a.

All defendants moved to dismiss the Second Amended Complaint. On June 29, 1994, the district court again granted defendants' motions to dismiss in a comprehensive opinion. This time, the dismissal was with prejudice. Following entry of judgment in favor of the defendants in July 1994, plaintiffs appealed to the Ninth Circuit. During the pendency of that appeal, plaintiffs dismissed their claims as to certain defendants.[2] The Ninth Circuit affirmed the judgment of the district court in an opinion issued on May 7, 1996. (Pet. App. at 30a-56a). Plaintiffs sought reconsideration and rehearing *en banc*. The Ninth Circuit panel withdrew its prior opinion and issued a slightly modified opinion on July 17,

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[1] This opinion is in Petitioners' Appendix ("Pet. App.") at 113a-153a.

[2] The defendants against whom the appeal was dismissed are outside directors Lawrence G. Finch, Robert A. Hoff and Russell J. Robelen; and venture capital firms, Sigma Partners, Sigma Management, Sigma Management II, L.P., Crosspoint Venture Partners and Idanta Partners. *See* Stipulations re Dismissal of Appeal as to Certain Claims, filed on April 27, 1995 and May 11, 1995. (Pet. App. at 156a-157a). These individuals and entities had been named as defendants for the first time in the Second Amended Complaint.

1996. The modified opinion is reported at 89 F.3d 1399 (9th Cir. 1996). (Pet. App. at 1a-29a). Plaintiff's subsequent petition for reconsideration and rehearing *en banc* was denied by the Ninth Circuit on August 27, 1996. (Pet. App. at 154a-155a).

B. Statement of Facts.

1. Background.

Stac designs and sells data compression products that increase the capacity of computer storage devices. Second Amended Complaint, Pet. App. 167a *et seq.* at ¶ 46. The Company's award-winning "Stacker" product doubles the storage capacity of disk drives in computers that use Microsoft's MS-DOS and compatible operating systems.[3] *Id.* The Company sells Stacker primarily through distributors. *Id.*

After introducing Stacker in December 1990, Stac's revenues and earnings increased significantly. As the Prospectus disclosed, annual revenues increased from $1.76 million in fiscal 1990 (ended September 30) to $8.39 million in fiscal 1991; earnings improved from a loss of $.05 to a profit of $0.01 per share. *Id.* at ¶ 47. In the six months immediately preceding the May 7, 1992 public offering, the Company's revenues were approximately

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[3] Stacker received critical acclaim throughout the relevant time period. This acclaim included *PC Magazine's* Technical Excellence Award, *Window Magazine's* Best 100 Windows Products, *PC Magazine's* Editor's Choice Award, *PC Computing's* Award of Distinction, *Byte Week's* Best of COMDEX, and National Software Testing Lab's Recommendation (5 Stars).

$17 million and its earnings were $0.21 per share. *Id.* Stacker accounted for 74% of revenues in fiscal 1991 and 90% of revenues in the first six months of fiscal 1992. *Id.* at ¶ 59.

2. The Public Offering and the Prospectus.

On May 7, 1992, Stac conducted an initial public offering of common stock (the "Offering" or "IPO"). *Id.* at ¶ 45. The prospectus and registration statement pursuant to which the stock was issued (the "Prospectus") summarized Stac's past results and its current business. *Id.* at ¶ 47. The Company was extraordinarily specific about the immediate risks facing the Company. In four pages of risk factors, Stac warned of competition, its dependence on Stacker, technological change and product obsolescence, threats to its intellectual property, its reliance on distributors, its limited source of supply, and the potential volatility of its stock price. Pet. App. at 4a. In addition, the Prospectus expressly warned of Microsoft's competitive threat:

> To date, most of the Company's revenues have derived from sales of products that operate under the MS-DOS operating system of Microsoft Corporation ("Microsoft"). One developer of a compatible operating system has licensed a competitive data compression product for incorporation into the latest version of its operating system. *There can be no assurance that Microsoft or personal computer manufacturers will not incorporate a competitive data compression technology in their products or that such technology will not otherwise emerge as an industry standard.*

Second Amended Complaint, Pet. App. 167a *et seq.* at ¶ 58 (emphasis added). It repeated this disclosure, adding that the products offered by vendors like Microsoft "could render obsolete or adversely affect sales of the Company's products." Pet. App. at 85a.

The Company disclosed not only that it was dependent on Stacker, but also that it did not know whether the market for Stacker would grow, whether the Company could adapt Stacker to changes in new versions of MS-DOS, or whether it could adapt Stacker to the emergence of new operating systems. Second Amended Complaint, Pet. App. 167a *et seq.* at ¶ 59. The Company warned that it typically operates with very little backlog of orders so that quarterly revenues were dependent on distributors' order patterns, which were influenced by product announcements and product development. *Id.* at ¶ 60. It warned that Stac had no control over distributors, who might not support or might cease to carry Stacker. Pet. App. at 79a-80a. The Prospectus described in detail Stac's distributor return policy for older products and its stock balancing programs (whereby distributors may return products for credit toward future purchases). Second Amended Complaint, Pet. App. 167a *et seq.* at ¶ 50. It warned in this regard that "[l]ike other manufacturers of packaged software products, the Company is exposed to the risk of product returns." Pet. App. at 18a. Significantly, Stac stated that, in the six months prior to the Offering, "the Company's distributors and software reseller returned substantial quantities of the initial version of Stacker in exchange for version 2.0." *Id.* Further, Stac expressly warned that its allowance for returns could be materially inadequate:

> Although the Company believes that it provides adequate allowances for returns, there can be no assurance that actual returns in excess of recorded allowances will not result in a material adverse effect on business. . . .

Id. at 19a.

Finally, the Company specifically disclosed that its revenues in the prior quarter may have been influenced by "the phenomenon of 'channel fill' during initial shipments of new versions or new products." Pet. App. at 79a. The Company further stated that it had recently released a new version of Stacker and warned:

> *Channel fill often occurs following the introduction of a new product or a new version* of a product as distributors buy significant quantities of the new product or version in anticipation of sales of such product or version. *Following such purchases, the rate of distributor's* [sic] *purchases may decline.* . . . During the first six months of fiscal 1992 the Company's distributors and software reseller returned substantial quantities of the initial version of Stacker in exchange for version 2.0 of Stacker.

Pet. App. at 18a (emphasis added). Thus, the market was warned that Stac might very well experience a slowdown.

Two and a half months later, when Stac's stock declined on its July 20, 1992 announcement of $0.11 earnings per share (which were below market expectations), plaintiffs filed their securities fraud actions within three days.

3. Plaintiffs' Allegations.

Paragraphs 43-68 of the Second Amended Complaint purport to set forth defendants' alleged misrepresentations and omissions. Pet. App. 167a *et seq.* at ¶¶ 43-68. The Complaint alleges that demand for Stacker was being diminished by consumers' anticipation of a competitive new product (*id.* at ¶¶ 49(3), 53(a), 58(c), 59(b), 67(a)) and that Stac failed to disclose this weakened demand and its "knowledge" that Microsoft would "soon be announcing" a version of MS-DOS that included a "free" data compression product. *Id.* at ¶¶ 44(e), 49(c), 49(i), 49(l), 53(b), 58(a), 59(a), 59(h), 60(d), 64(c)-(d), 67(e). The complaint alleges that by offering special incentives (including price discounts and extended rights of return), Stac "stuffed" its distribution channels in the quarter prior to the IPO (*id.* at ¶¶ 44(a)-(d), 49(e)-(h), 51(a)-(c), 53(c), 58(c), 59(b)-(d), 66(a)-(b), 67(a)-(c), 68(a)-(c)), which resulted in excessive inventories among Stac's distributors (*id.* at ¶¶ 66(d)-(e), 67(f)-(g)), and that Stac had failed to create reserves for this inventory that would be returned to Stac (*id.* at ¶¶ 44(d), 51(b)). The remaining allegations of plaintiffs' 73-page complaint merely repeat this same handful of allegations.

4. The Decision of the Ninth Circuit

In affirming dismissal of the Second Amended Complaint, the Ninth Circuit affirmed the district court's decision to take judicial notice of the $120 million judgment obtained by Stac against Microsoft Corporation for patent

infringement and found on that basis that Stac's statements that its product was protected by patent were not false and misleading. (Pet. App. at 14a).

The Ninth Circuit then determined, based on its review of the Prospectus, that Stac made adequate disclosure of the threat that Microsoft might include data compression functionality in its new operating system, MS-DOS 6.0. *Id.* at 14a-17a. To the extent that the Prospectus did not definitively predict such competition from Microsoft, the Ninth Circuit held that Stac was under no duty to predict the future and that Stac could not know with certainty the product plans of its competitors – particularly when the threatened new product would violate Stac's own patents. *Id.* at 15a-17a. Finally, the Ninth Circuit noted in this regard that plaintiffs themselves alleged that public demand for Stac's product was declining because the public believed that Microsoft might include data compression in its new operating system. *Id.* at 24a. In light of this judicial admission, buttressed by the recognized legal conclusion that the public is aware of the risk of obsolescence in the high technology industry, plaintiffs could not prevail in their fraud on the market claim.

With respect to the allegations of financial improprieties, the Ninth Circuit found that "the Prospectus describes the phenomenon of channel-filling with its attendant risks, spells out Stac's liberal return policy, warns investors of Stac's exposure to the risk of product returns, and advises investors not to predict future returns on the basis on the results of any single quarter." *Id.* at 17a. The Ninth Circuit then found not only that these disclosures negated plaintiff's allegations of factual omissions but also "bespoke caution" thus leading "to the

inexorable conclusion that investors were specifically and adequately cautioned about the relevant risks. Insofar as Stac's alleged misstatements can be viewed as 'optimistic projections,' they are more than adequately covered by the bespeaks caution doctrine." *Id.* at 21a-22a. The Ninth Circuit found that "the Stac prospectus neither stints on warnings nor fails to disclose Stac's practices, but 'fairly overflows' with specific and detailed cautionary language." *Id.* at 23a.

Finally, the Ninth Circuit found that Fed. R. Civ. P. 9(b) applies to claims brought under Section 11 of the Securities Exchange Act when such claims "are grounded in fraud." *Id.* at 11a. The Ninth Circuit employed Rule 9(b) as an alternative basis for dismissal of claims based on the Prospectus and dismissed allegations relating to Stac's road show presentations for failure to plead fraud with sufficient particularity. *Id.* at 22a-23a, 26a. It also dismissed the claim against the one remaining newly-named defendant, John Witzel, under the statute of limitations. Petitioners do not challenge the Ninth Circuit's ruling on the statute of limitations.

ARGUMENT

I. BECAUSE THE PRESENT CASE WAS DECIDED UNDER PLEADING STANDARDS DRAMATICALLY ALTERED BY THE PRIVATE SECURITIES LITIGATION REFORM ACT, THIS CASE DOES NOT MERIT THIS COURT'S ATTENTION

In December 1995, Congress passed the Private Securities Litigation Reform Act of 1995 (the "Reform Act"),

Pub. Law No. 104-67. The Reform Act dramatically changed the law governing the requirements for pleading a claim for securities fraud. Among other things, it heightened the requirements for pleading *scienter*, provided safe harbors for certain forward-looking statements, and made explicit the particularity requirements for securities fraud claims. The Reform Act defines the pleading standards for all securities fraud claim actions filed after December 23, 1995.

This case was filed in 1992, well before enactment of the Reform Act. Each court to have addressed the merits of the complaint did so under the law in effect prior to enactment of the Reform Act. None of the courts addressing the complaint considered any of the provisions of the Reform Act in reaching their conclusions.

Because this case involves the application of pleading standards largely superseded by the Reform Act, any decision rendered by the Court would have little effect on subsequent cases or the development of securities law in general. Accordingly, none of the issues raised by the present case present "important federal questions" within the meaning of United States Supreme Court Rule 10. To accept certiorari in this case would be to render a decision on legal issues rendered largely moot by Congressional enactment of the Reform Act and would constitute a waste of this Court's scarce resources.

II. THE NINTH CIRCUIT'S RULING THAT FED. R. CIV. P. 9(B) APPLIES TO CLAIMS ASSERTED UNDER SECTION 11 OF THE EXCHANGE ACT IS CONSISTENT WITH THE DECISION OF EVERY OTHER CIRCUIT COURT, IS CORRECT, AND IS NOT, IN ANY EVENT, OUTCOME DETERMINATIVE

The Ninth Circuit held in this case that "the particularity requirements of Rule 9(b) apply to claims brought under Section 11 when, as here, they are grounded in fraud." Pet. App. at 11a. This ruling is consistent with the ruling of every other Circuit Court to have addressed the issue. *Shaw v. Digital Equipment Corp.*, 82 F.3d 1194, 1223 (1st Cir. 1996); *Melder v. Morris*, 27 F.3d 1097, 1100 n.6 (5th Cir. 1994); *Shapiro v. UJB Fin. Corp.*, 964 F.2d 272, 287-89 (3d Cir.), *cert. denied*, 506 U.S. 934 (1992). Petitioners have identified, and research has disclosed, no Circuit Court to have taken a contrary view. The only conflict among "the lower courts" to which Petitioners can therefore cite is the conflict between older district court decisions and the more recent decisions of the Courts of Appeals. *See* Petition at 10-11 & nn. 4 & 5. There is not, therefore, any decision "in conflict with the decision of another United States court of appeals on the same important matter." S. Ct. Rule 10(a).

The Ninth Circuit's ruling on the applicability of Rule 9(b) was, in any event, correct. The application of Rule 9(b) does not depend upon the elements of the claims asserted; it depends instead on whether the cause of action includes "averments of fraud." *See Shapiro v. UJB Fin. Corp.*, 964 F.2d at 287-89. Put another way, while

a Section 11 claim does not require an allegation of fraudulent intent, if plaintiff chooses nevertheless to include an allegation of fraudulent intent, such an allegation must be pleaded with the particularity required by Rule 9(b). Nothing in Section 11 of the Securities Act prohibits the application of Rule 9(b) to allegations that the plaintiff chooses to frame in terms of fraud. In this case, the Ninth Circuit found that the Section 11 claims were "grounded in fraud." This finding was based on plaintiffs' allegation in their Section 11 claim incorporating all 75 of the preceding paragraphs of the complaint, including allegations that defendants acted intentionally and fraudulently.[4] The Ninth Circuit's application of the legal principle that Rule 9(b) applies to allegations of fraud does not merit this Court's attention.

These holdings are not inconsistent with this Court's decision in *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993). There, the Court determined that policy considerations could not justify the imposition of heightened pleading standards for § 1983 claims against municipalities that were not based on fraud. There was no allegation of fraud in the complaint at issue in *Leatherman*. By contrast, here and in the other Circuit Court decisions applying Rule 9(b) to Section 11 claims, plaintiffs alleged fraud – which falls directly within the ambit of Rule 9(b).

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[4] While it is true that in incorporating the prior 75 paragraphs, plaintiffs attempted to "except allegations of fraud," the Ninth Circuit found "[t]hese nominal efforts unconvincing where the gravamen of the complaint is plainly fraud." Pet. App. at 11a. Indeed, the complaint nowhere alleges any basis for Section 11 liability other than fraud.

Even if not correct, the Ninth Circuit's application of Rule 9(b) was not outcome determinative. The Ninth Circuit disposed of all of petitioners' claims based on the Prospectus by determining either that the allegedly omitted facts were disclosed, need not have been disclosed, or were adequately covered by the bespeaks caution doctrine. At most, the Ninth Circuit employed Rule 9(b) as an alternative ground for dismissal of plaintiffs' Section 11 claims based on the Prospectus. Pet. App. at 22a-23a.

The only claims dismissed on the sole basis of Rule 9(b) were claims based on alleged oral statements purportedly made by defendants during pre-offering "road show" presentations to investors and securities analysts. Pet. App. at 26a. By definition, these were Section 10(b) and Rule 10b-5 claims, not Section 11 claims. Section 11 provides a claim for relief only "[i]n case any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading." 15 U.S.C. § 77k. Since the claims dismissed under Rule 9(b) were not based on statements in the registration statement but were instead oral statements made in road shows, the claims by definition were asserted under Section 10(b) of the Exchange Act. Even Petitioners admit that there is no dispute as to the applicability of Rule 9(b) to claims asserted under Section 10(b) and Rule 10b-5, each of which required pleading and proof of *scienter.*

III. THE NINTH CIRCUIT'S DISMISSAL OF CLAIMS BASED ON ITS DETERMINATION THAT THE ALLEGEDLY OMITTED FACTS WERE ACTUALLY DISCLOSED IN DOCUMENTS UPON WHICH PLAINTIFFS BASED THEIR CLAIMS PRESENTS NO IMPORTANT QUESTION OF LAW

In affirming dismissal of the Second Amended Complaint, the Ninth Circuit reviewed the public documents cited in the complaint and determined that those documents actually disclosed the very facts that plaintiffs alleged were concealed. This determination presents no important question of law; it was, instead, an application of a properly stated rule of law.

It is elemental that in order to be actionable under the federal securities laws, a Prospectus must "omit[ ] to state a material fact . . . necessary to make the statements therein not misleading." 15 U.S.C. § 77k. Likewise, in order to be actionable under Section 10(b) and Rule 10b-5, a statement must "omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading." 17 C.F.R. 240.10b-5. Applying this established standard of liability, the Circuit Courts that have addressed the issue are unanimous that where the allegedly omitted fact is actually disclosed, plaintiff cannot state a claim. *Romani v. Shearson Lehman Hutton*, 929 F.2d 875 (1st Cir. 1991); *In re Donald J. Trump Casino Sec. Litig.*, 7 F.3d 357 (3d Cir. 1993), *cert. denied*, 510 U.S. 1178 (1994); *Nobles v. First Carolina Communications, Inc.*, 929 F.2d 141 (4th Cir. 1991); *In re Convergent Technologies Sec. Litig.*, 948 F.2d 507, 515-16 (9th Cir. 1991).

There is no conflict among the Circuit Courts regarding this statement of the law. The most that Petitioners may argue is that the Ninth Circuit misapplied this rule of law. No such misapplication occurred. In this case, as the Ninth Circuit found, the Prospectus expressly disclosed the threat that Microsoft might enter the data compression market, that the Company's reserves for product returns may not be adequate, and that demand for Stac's product might decline in the wake of recent channel fill. The Ninth Circuit's application of settled law to the allegations of the complaint, including the Prospectus, is not the proper basis for a grant of certiorari.

Nor is there any dispute among the Circuit Courts that the determination of whether a challenged statement actually disclosed allegedly omitted facts may be made on a motion to dismiss where the documents containing the disclosures are cited and quoted in the complaint. *San Leandro Emergency Medical Group Profit Sharing Plan v. Philip Morris Companies, Inc.*, 75 F.3d 801 (2d Cir. 1996); *In re Donald J. Trump Casino Sec. Litig.*, 7 F.3d 357 (3rd Cir. 1993), *cert. denied*, 510 U.S. 1178 (1994); *Nobles v. First Carolina Communications, Inc.*, 929 F.2d 141 (4th Cir. 1991); *Lovelace v. Software Spectrum, Inc.*, 78 F.3d 1015 (5th Cir. 1996); *Branch v. Tunnell*, 14 F.3d 449 (9th Cir.), *cert. denied*, 114 S. Ct. 2704 (1994); *Durning v. First Boston Corp.*, 815 F.2d 1265 (9th Cir.), *cert. denied*, 484 U.S. 944 (1987).

Accordingly, the Ninth Circuit's decision is in accord with the legal interpretation and procedural practices of every Circuit Court to have addressed the issue. It presents no conflict among the Courts of Appeal and no important question of law that requires resolution by this Court.

IV. THE NINTH CIRCUIT'S APPLICATION OF THE BESPEAKS CAUTION DOCTRINE PRESENTS NO IMPORTANT QUESTION OF LAW WORTHY OF THIS COURT'S ATTENTION

Every Circuit Court to have addressed the issue has held that the bespeaks caution doctrine applies to claims under the federal securities laws. *See, e.g., Shaw v. Digital Equipment Corp.*, 82 F.3d 1194 (1st Cir. 1996); *Romani v. Shearson Lehman Hutton*, 929 F.2d 875, 879 (1st Cir. 1991); *San Leandro Emerg. Med. Group Profit Sharing Plan v. Philip Morris Cos.*, 75 F.3d 801, 811 (2d Cir. 1996); *I. Meyer Pincus & Assocs., P.C. v. Oppenheimer & Co.*, 936 F.2d 759, 763 (2d Cir. 1991); *In re Donald J. Trump Casino Sec. Litig.*, 7 F.3d 357, 371 (3d Cir. 1993), *cert. denied*, 510 U.S. 1178 (1994); *Rubinstein v. Collins*, 20 F.3d 160, 166-68 (5th Cir. 1994); *Sinay v. Lamson & Sessions Co.*, 948 F.2d 1037, 1040 (6th Cir. 1991); *Harden v. Raffensperger, Hughes & Co.*, 65 F.3d 1392, 1404 (7th Cir. 1995); *Saltzberg v. TM Sterling/Austin Associates, Ltd.*, 45 F.3d 399, 400 (11th Cir. 1995). That doctrine "provides a mechanism by which a court can rule as a matter of law that defendants' forward-looking representations contained enough cautionary language or risk disclosure to protect the defendant against claims of securities fraud." *Fecht v. Price Company*, 70 F.3d 1078, 1081 (9th Cir. 1995), *cert. denied*, 116 S. Ct. 1422 (1996) (citation omitted). It "merely represents the pragmatic application of two fundamental concepts in the law of securities fraud: materiality and reliance." *In re Worlds of Wonder Sec. Litig.*, 35 F.3d 1407, 1414 (9th Cir. 1994), *cert. denied*, 116 S. Ct. 185 (1995).

In enacting the Reform Act, Congress specifically endorsed and encouraged further judicial development of the bespeaks caution doctrine. Thus, the "safe harbor" provisions of the Reform Act are based in part on the judicially created bespeaks caution doctrine, and Congress took special pains to note that it "does not intend for the safe harbor provisions to replace the judicial 'bespeaks caution' doctrine or to foreclose further development of that doctrine by the courts." H.R. Conf. Rep. No. 104-369, 104th Cong., 1st Sess. at 46 (1995). Given this Congressional endorsement of the doctrine, there can be no question but that the doctrine should continue to apply to securities fraud claims.

Accordingly, the only questions even arguably raised by the Ninth Circuit's decision in this case is whether its *application* of the doctrine was correct. The question of applicability of a settled rule of law to the particular complaint at issue here is not an important question of law worthy of the Court's attention.

CONCLUSION

For all of the reasons set forth above, Respondents respectfully request that this Court deny the Petition for Writ of Certiorari in this case.

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Respectfully submitted,

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